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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1974**

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No.

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CHARLES LEONARD,

*Petitioner,*

*v.*

BERNARD I. STRAUSS,
*As Agent For*
SEVENTY-SECOND STREET PROPERTIES, INC.,

*Respondent,*

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## PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE APPELLATE DIVISION FIRST DEPARTMENT

Petitioner, Charles Leonard, prays that a Writ of Certiorari issue to review the judgment of the New York Supreme Court, Appellate Division, First Department, entered May 9, 1974.

### Opinions Below

None of the opinions below have been reported. The opinion of the Honorable Louis Grossman entered May 21, 1973 is set out in Appendix A hereto; his effectuating decision and final judgment of possession entered May 22, 1973

is set out in Appendix B hereto. The New York Supreme Court, Appellate Term, First Department's ("Appellate Term") decision and order of January 17, 1974 affirming said final judgment of possession and the order of said Appellate Term denying petitioner's request for leave to appeal to the New York Supreme Court, Appellate Division, First Department ("Appellate Division") are set out in Appendices C and D hereto. The order of the said Appellate Division denying petitioner's request for leave to appeal to the Appellate Division is set out in Appendix E hereto. There is no other appeal or motion for leave to appeal which the petitioner may make in the New York State courts.

The enforcement of said final judgment has been stayed pursuant to Section 5519(a)(6) of the Civil Practice Law and Rules and tenants' undertaking pursuant to court order is $1,000.

The interlocutory decision and order of Hon. Alexander Salottolo, Judge of the New York City Civil Court, entered March 16, 1973, granting respondent's motion to strike petitioner's demand for a jury trial is set out in Appendix F hereto. The order of New York Supreme Court, Appellate Term, First Department, entered on or about May 17, 1973, affirming without opinion the interlocutory decision and order striking petitioner's demand for a jury trial is set out in Appendix G hereto.

## Jurisdiction

The jurisdiction of this Court is invoked pursuant to Title 28 USC §1257(3).

## Question Presented

Whether an order by a State court in a summary eviction proceeding which struck the tenant's jury demand

constituted a denial of the tenant's right to a fair trail guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution where such order is based on a presumption of waiver of the tenant's State constitutional right to a jury trial in the absence of any showing by the landlord that a knowing, conscious and voluntary waiver did in fact occur at the time of the execution of said tenant's lease which contained the purported contractual waiver of the tenant's right to a trial by jury.

## Statutory Provisions Involved

The pertinent provisions of the New York Constitution Article I, §2, are set forth at p. 10 herein and may be found at p. 204 of *McKinney's Constitution, Art. 1 to 2.*

## Statement of Case

### A. Nature of Case

The petitioner Charles Leonard (sometimes "Leonard" or "tenant") seeks review of a decision and order of the Appellate Division which denied the petitioner's motion for leave to appeal to said court from an opinion and order of the Appellate Term which had affirmed the opinion and order of the New York City Civil Court in favor of Bernard I. Strauss, as attorney and agent for Seventy-Second Street Properties, Inc. (sometimes "Strauss" or "landlord") which granted the application of Strauss to strike the tenant's demand for a jury trial. The federal claim of right under the Due Process Clause of the Fourteenth Amendment was specially set up by tenant's attorney in papers filed in opposition to said application to strike the tenant's demand for a jury trial.

This lawsuit was commenced by service of a notice of petition and petition in February of 1973 upon Leonard by the landlord. The tenant served a verified answer on or about February 15, 1973. On February 27, 1973 the land-

lord moved to strike the tenant's request for a jury trial. On March 6, 1973 the tenant submitted opposing papers specially setting up tenant's federal claim of right under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A copy of the affidavit in opposition and affirmation in opposition of Leonard and his attorney, both dated March 6, 1973 are set out in Appendices H and I hereto. On March 16, 1973 the Hon. Alexander Salottolo granted landlord's motion to strike tenant's jury demand. This interlocutory order was appealed to the Appellate Term which affirmed the order without opinion on May 17, 1973. On April 19, 1973 the case was tried without a jury before the Honorable Louis Grossman.

Judge Grossman rendered a decision on May 21, 1973, and implemented that decision with a Decision and Final Judgment dated May 22, 1973 awarding possession to landlord. As stated, on January 17, 1974 the Appellate Term affirmed that Decision and Final Judgment in every respect and on March 1, 1974 the Appellate Term denied Leonard's request for leave to appeal to the Appellate Division. On May 9, 1974 the Appellate Division entered a denial of Leonard's request for leave to appeal to that court. There is no further state court review of Leonard's contention that the waiver of his right to trial by jury was unconstitutional and was therefore void. Thus the petitioner now seeks a review of all of those orders which were ultimately affirmed in the last mentioned order of the Appellate Division First Department, dated May 9, 1974.

The way in which the tenant's special claim of federal right under the Due Process Clause of the Fourteenth Amendment to the United States Constitution was originally presented in papers filed in opposition to the pretrial motion to strike tenant's demand for a jury trial and the manner in which such claim of federal right was rejected in each court of review is summarized with quotations from the record in Appendix J.

**B. Statement of Facts**

In August, 1962, Leonard, a partner in a New York stock brokerage and underwriting firm, went to the offices of Douglas A. Elliman, Inc., a highly reputable real estate brokerage and management firm in New York City to sign a lease for a residential apartment at 315 East 72nd Street in the Borough of Manhattan. There he signed the Standard Form of Lease of the Real Estate Board of New York, consisting of thousands[1] of words in fine print. Paragraph 23 of that lease contained a waiver of the right to jury trial by both parties to the lease in any summary eviction proceeding. Leonard asked the broker prior to signing the lease whether the lease contained anything of an unusual character which should be called to his attention and the broker indicated there was not, so Leonard signed.

Ten years later, after the original two year lease had been renewed a number of times, a dispute arose between Leonard and his landlord. The landlord had sent Leonard a form, required by law, stating that as tenant he could elect to renew his lease within sixty days. Leonard testified that he signed the form and returned it by ordinary mail. At the end of the sixty day period the landlord sent Leonard another notice stating his failure as tenant to renew his lease and notifying him to vacate his apartment at the end of his term. Leonard never received this notice and only became aware of the problem when the landlord asked to show his apartment to prospective tenants. Leonard of course protested that he had renewed his lease by sending his form to the landlord in the same manner as he had in the past, but the landlord denied that he had received it.

At the end of the term of the lease, the landlord commenced the aforementioned summary hold-over proceeding

1. Without counting ordinary type, riders or the "Rules and Regulations", the substantive provisions appearing in fine print amount to more than 6,000 words.

alleging that the tenant had remained in possession after the end of his term and demanding a judgment of eviction awarding possession to the landlord.

Leonard has always maintained, with no contradiction by Strauss, that he was never aware of the waiver of jury trial clause at the time he executed the lease and his specific question as to the existence of anything unusual in the lease had been answered in the negative. Essentially Leonard's defense was two pronged: he alleged that he had sent the notice and that he had sent that notice by regular mail as had been the previous custom between the parties. In light of Judge Grossman's unfavorable decision on these defenses it is obvious that he did not believe[1a] Leonard. The trial judge performed one of the most fundamental functions of a jury—determining the credibility of a witness.

## Why Certiorari Should Be Granted

This case raises an important and fundamental problem under the Fourteenth Amendment Due Process Clause of the Constitution which will affect millions of landlord-tenant and other consumer relationships in the City of New York alone.

### I. The Middle Class Consumer as Non-Lawyer

Leonard, like so many of his middle class counterparts, is well-educated and not a member of any economically, educationally or socially deprived minority. He did not feel the need to have a lawyer at his side when he bought a car or rented an apartment or made some other commonplace contract as an ordinary middle-class consumer. He was highly competent in his own field and aware of changing economic, political, social and other trends on the local, national and international levels, but he was as helpless as most Americans if his dishwasher broke down or if his wife became seriously ill, or if he was called upon to read and understand the fine print in a New York City lease.

1a. See Judge Grossman's decision referring to "inadequacy of proof by Leonard," Appendix A, at p. A-3.

Procedural due process of law under the United States Constitution and the various State constitutions and other statutory procedural rights which are likely to be essential to a fair trial are unfamiliar to him. And Leonard's unfamiliarity in this regard has nothing to do with his level of income or education. It is typical of practically every consumer who is not a lawyer.

When a lease or other consumer agreement contains a "waiver of jury trial" which is (1) then brought to the consumer's attention[2] and (2) under circumstances where he is free to accept or reject the waiver clause (both circumstances being so rare as to be virtually non-existent), it should be obvious even then that although the consumer may know what a jury trial "is" in the popular context, he has absolutely no appreciation[3] that the consequence of waiver may well be the forfeiture of a fair trial in the event of a serious dispute between him and the lender, seller, or landlord. This would be particularly so where the outcome of such dispute is likely to turn on the consumer's own credibility or the resolution of factual issues concerning the consumer's own acts.[3a] Naturally, these elements are present to a great degree in every consumer case.

## II. Waiver of right to Notice & Hearing as outdated "standard procedure".

Prior to the recent decisions of this Court providing for the imposition of federal standards for waiver of the fed-

2. Paragraph 23 was headnoted in heavy type "Waiver of Trial by Jury" and the landlord and the court below both felt Leonard should have noticed this. See Appendix F, at p. F-2.

3. See discussion by Douglas J., dissentnig with the concurrence of three Justices in *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 283 (1941).

3a. It should be noted that New York State statutes make lease provisions void to the extent they exempt the landlord from liability or waive the right to trial by jury with respect to *tortious* acts. See *Birchwood Associates* v. *Steigauf*, 75 Misc. 2d 728, 348 N.Y.S. 2d 900 (Dist. Ct., Suffolk County, 1973).

eral procedural due process rights to notice and a hearing, especially for purported waivers by contract, it was "standard procedure" for the consumer to sign wage assignments,[4] conditional sales agreements,[5] leases of personal or real property,[6] or cognovit notes,[7] without any appreciation that as a consequence thereof the right to a pre-judgment hearing would be forfeited in the event of a dispute between the parties, or, more importantly, of the ultimate finality of the judgment obtained without a hearing and the relative paucity of any post-judgment remedies.

### III. Waiver of jury trial by consumers as a currently prevailing "standard procedure".

The Petitioner's case brings up for review an equally unconstitutional "standard procedure" currently prevailing in the commercial and landlord-tenant areas consisting of the waiver in advance by contract, without regard to federal standards for the waiver of federal constitutional rights in civil cases, of the most essential State procedural safeguard of the federal right to a fair trial in a consumer context, i.e., the "critical function" of the jury in introducing "a lay judgment",[8] into the machinery of commercial or landlord-tenant law in which the lender, seller, or landlord enforces rights against consumers in such volume that certain parts of the court system tend to become dominated by the so-called "vested interests" unless a jury of laymen unconnected with such system or such interests is present.

4. *Bond* v. *Dentzer*, 362 F.Supp. 1373 (N.D. N.Y.,1973).

5. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

6. *Fuentes* v. *Shevin, supra; Gonzales* v. *County of Hidalgo, Texas*, 489 F.2d 1047, 1049 (5th Cir., 1973).

7. *Swarb* v. *Lennox*, 405 U.S. 191 (1972).

8. See *Humphry* v. *Cady*, 405 U.S. 504, 509 (1972) (jury trial in commitment proceedings under Wisconsin Mental Health Act).

**IV. The question not heretofore decided by this Court is whether federal standards apply to the waiver of State procedural rights regarded by this Court as essential prerequisites to a fair trial.**

Thus, while it is already well-established that federal standards for waiver of federal constitutional rights now apply in the context of the waiver of *any* notice or *any* hearing prior to judgment in civil cases, the Petitioner's case presents the question of whether such federal standards should also apply to the waiver of State procedural safeguards which by the decisions of this Court have come to be regarded as essential prerequisites to a fair trial, such as a jury duly demanded under State law. See *Quensnell* v. *State*, 83 Wash. 2d 224, 517 P. 2d 568 (1973) citing *Humphry* v. *Cady, supra* fn. 8 *Adams v. United States ex rel. McCann*, 317 U.S. 269, *supra; Parnell* v. *Southall Realty*, U.S. , 40 L. Ed. 2d 198 (1974).

Recent cases of this Court have clearly held that the waiver of any fundamental constitutional right (State or federal) must be made consciously, knowingly, and voluntarily. (See pp. 12-13, *infra.*) This doctrine was a recognition of the unusual disparity of bargaining power between the respective parties in many of the above-mentioned contract situations. And no better example of two parties meeting on an unequal footing can be found than when the tenant and landlord "bargain" over residential space in the Borough of Manhattan.[9]

9. Since 1945 the City of New York has maintained emergency rent control laws and in 1974 these laws were extended to cover virtually all residential apartments. The continuing reason for these laws is the scarcity of residential apartments.

## V. The fundamental nature of jury trial in summary eviction proceedings in New York.

It should first be noted that New York law has long recognized the right to a trial by jury in any summary proceedings for the recovery of real property. *Bryan* v. *McGurk*, 200 N. Y. 332, 337-339, 93 N.E. 989, 990-1991 (1911).

As early as 1882 the New York State Legislature provided for a trial as of right in summary proceedings to recover possession of real property. *Throops N.Y. Code of Civ. Proc.* (1882) in Chapter XVII which deals with summary proceedings to recover possession of real property states in § 2247:

> "§ 2247. The issues joined by the petition and answer must be tried by the judge or justice, unless either party to such proceedings shall, at the time designated in such precept for showing cause, demand a jury, and at the time of such demand pay to such judge or justice the necessary costs and expenses of obtaining such a jury. If a jury be demanded, and such costs and expenses be paid the judge or justice with whom such petition shall be filed shall nominate twelve reputable persons, qualified to serve as jurors in courts of record, [and shall provide a jury trial as of right of issues of fact in dispute between the parties]."

The N.Y. Const. Art. I, § 2 (1939) states:

> "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. * * *"

Since the right to trial by jury in summary proceedings for the recovery of real property was constitutionally guaran-

teed in 1894, it is therefore carried forward by the present above quoted constitutional provision. See *Real Property Actions and Proceedings Law*, § 745, Source of Section (McKinney's Supp. '74); 7 Carmody-Wait 2d Section 49.26 (1966). The tenant is thus entitled to a trial by jury in the summary proceeding to recover possession of real property.

## VI. Contracts of Adhesion for residential apartments in New York City.

Any waiver of trial by jury by a tenant must be subjected to the closest constitutional scrutiny. Clearly, such waiver is not in the tenant's interest. The standard form of lease arrangement is prepared by the Real Estate Board of New York, Inc. As stated, in no other location do the tenant and landlord stand in such unequal positions as in New York City. The tenant has stated that at the execution of the lease he was not represented by an attorney nor was he made aware of the waiver contained in paragraph 23 of that lease. The tenant's waiver was anything but knowing, conscious, or voluntary.

But even if the waiver was inadequate, is that still the tenant's misfortune? Is he not bound by this agreement and its waiver provisions no matter how onerous? If one adopts an archaic approach heavily influenced by the law as expounded by Lord Coke then the answers to both of these questions will be yes. *Gardiner* v. *Butler*, 245 U.S. 603, 605 (1917). But if the law of leases is viewed in light of legal principles enunciated in this century then the answer to both of the above questions will and should be no.

As one court has aptly stated:

> "Landlords and tenants do not generally meet on an equal footing. Land and space are limited and in short supply. Tenants more often than otherwise, must take inequitable lease provisions as offered, or not get much needed space at all. To strictly en-

> force provisions of leases in such circumstances is to run counter to all modern thinking." *57 E. 54 v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 355, 335 N.Y.S. 2d 874 (App. Term 1st Dept. 1972).

This Court has recently articulated guidelines for the waiver of a constitutional right in a civil proceeding which when coupled with other precedents will provide this Court with not only a frame of reference but the necessary holdings and rationale upon which to decide the instant application.

In the landmark case of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) this Court stated:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464.

This classic definition of waiver, although pronounced in a case concerning the rights of the criminally accused, appears in virtually every subsequent discussion of waiver, be it in connection with constitutional rights or with statutory, common law or contract rights. *Cf. Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 143 (1967) (First Amendment rights), *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937) (Due process rights in rate fixing hearing), *Van Bourg* v. *Nitze*, 388 F.2d 557 (D.C. Cir. 1957) (Statutory rights in administrative hearing process), *Chambers & Co.* v. *Equitable Life Insurance Co.*, 224 F.2d 338 (5th Cir. 1955) (Contract rights), *Helvering* v. *Ethyl D. Co.*, 70 F.2d 761 (D.C. Cir. 1934) (Statute of limitations governing liability for back taxes). See generally 28 Am. Jur. 2d 836 and 92 C.J.S. 1041. And while this

Court has never dealt with the issue in the case at bar in dicta it has stated:

> "But, as the right of jury trial is fundamental courts indulge every reasonable presumption against waiver." *Aetna Ins. Co.* v. *Kennedy,* 301 U.S. 389, 392 (1936)

The Supreme Court has also stated that any waiver of a constitutional right must be not only voluntary, but knowing and intelligent as well. *Brady* v. *United States,* 397 U.S. 742 (1970). There can be no waiver when the element of choice is between the "rock and the whirlpool", *Garrity* v. *New Jersey,* 385 U.S. 493, 498 (1967). The tenant looking for an apartment in New York City (particularly Manhattan) has a choice between the landlord's terms or no apartment at all. The parties are not in equal bargaining positions and the fundamental principle of give-and-take contract negotiations is a fiction. The result is a classic example of a contract of adhesion.

A contract of adhesion is one in which a standard contract is drafted unilaterally by a dominant party and presented to the weaker party on a "take it or leave it basis". Ehrenzweig, *Adhesion Contracts in Conflict of Laws,* 53 Colum. L. Rev. 1072, 1074 (1953). This is precisely the situation in the instant suit since the tenant is presented with the lease contract as a *fait-accompli* if he wants the premises. It is inaccurate to even define such an instrument in contractual terms. A contract is an agreement between the parties in which the parties mutually concur in their understanding of the terms and their minds meet. *Black's Law Dictionary,* 4th Ed. Adhesion contracts like the one before this Court do not provide for a meeting of the minds since the inferior party has no choice as to alter-

natives in the specifics of the contract. If there aren't any terms to be agreed upon, there is no meeting of the minds. Consequently there is no consent to a waiver of constitutional rights, but merely an involuntary acquiescence to a landlord dictated contract. Neither the courts nor legal writers have considered these types of contractual waivers as voluntary. See *Cedar Rapids Engineering Co.* v. *Haenelt*, 326 N.Y.S. 2d 653, affirmed, 39 A.D. 2d 275, 333 N.Y.S. 2d 953 (3rd Dept. 1972); *Finkenberg Furniture Corp.* v. *Vasquez*, 67 Misc. 2d 154, 324 N.Y.S. 2d 840 (Civ. Ct. N.Y. Co. 1971); *Kosches* v. *Nichols*, 68 Misc. 2d 795, 327 N.Y.S. 2d 968 (Civ. Ct. N.Y. Co. 1971); *Henningsen* v. *Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69, 86-88 (1960); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529, 530, 539-44 (1971); Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of Contracts*, 43 Column. L. Rev. 629, 632 (1943).

## VII. Federal standards apply to the waiver of federal rights.

Recently this Court promulgated a triology of cases concerning the contractual waiver of certain constitutional rights. Before discussing any of these cases separately, their general teaching should be articulated. These cases hold that for a party to waive a constitutional right even in a civil context, the waiver must be voluntary, intelligent and knowing.

Turning first to *Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972), the court dealt with a contract entered into between two corporations. The waiver of due process rights was specifically bargained for and drafted by the respective

lawyers for each party and the court found no grevious inequality in bargaining positions. The parties were aware of the meaning of the waiver. Thus there was no contract of adhesion. But the court took pains to point out that:

> "Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the [party receives nothing for the waiver] other legal consequences may ensue. *Id.* at 188.

The next case decided was *Swarb* v. *Lennox*, 405 U.S. 191 (1972). In that case Pennsylvania's cognovit practice was examined in light of due process considerations. The Supreme Court upheld a three-judge District Court which in part had held:

> "1. The Pennsylvania system . . . does comply with due process standards *provided* 'there is an understanding and voluntary consent' . . ." *Id.* at 198, citing 314 F.Supp. 1095 (emphasis supplied)

The last but most important aspect of the triology is *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). The relevant portion of this case concerned itself with the constitutionality of printed form sales contracts containing waivers of certain constitutional rights. The court stated:

> "In *Overmyer Co.* v. *Frick Co., supra,* the Court recently outlined the considerations relevant to determination of a contractual waiver of due process rights. Applying the standards governing waiver of constitutional rights in a criminal proceeding—although not holding that such standards must necessarily apply—the Court held that, on the particular

facts of that case, the contractual waiver of due process rights was 'voluntarily, intelligently, and knowingly made.' *Id* at 187. . . .

"The facts of the present cases are a far cry from those of *Overmyer*. There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.

"Yet, as in *Overmyer*, there is no need in the present cases to canvass those consequences fully. For a waiver of constitutional rights in any context must, at the very *least*, be clear." *Fuentes* v. *Shevin*, *supra*, at 95-96.

In light of the above mentioned cases there is little doubt left as to the necessity for a knowing, intelligent and voluntary waiver of a fundamental constitutional right under the relevant decisions of this Court.

## VIII. The Problem of Retroactivity: Voir Dire on the Issue of Waiver.

The problem of retroactivity under the foregoing trilogy of cases has been ruled upon by the United States District Court, District of Delaware in *Osmond v. Spence*, 359 F. Supp. 126, 127 (1972). As to application of federal standards to instruments executed prior to its original decision, which had preceded *Overmyer*, *Swarb* and *Fuentes*, the District Court on remand from this Court, held:

"Since a signed cognovit note does not constitute proof of an effective waiver, a hearing and judicial

determination are necessary, and an understanding and voluntary waiver must be shown prior to entry of judgment." (359 F. Supp. at 127)

**IX. Waiver of State procedural rights deemed essential by this Court to a fair trial should be governed by federal standards.**

Recently this Court delineated the area of procedural due process rights at trial, including the right to a jury, as being the area of primary concern for applying the rule of *Johnson v. Zerbst, supra,* requiring a voluntary and intelligent waiver in criminal cases. *Schneckloth v. Bustamonte* — U.S. —, 36 L.Ed 2d 854 (1972).

It is submitted that the waiver of jury trial in civil cases through use of contracts of adhesion such as the lease before this Court should be one area to which the federal standards governing waiver should be applied on the same basis as in *Swarb* and *Fuentes,* where the waiver of *all* due process rights was involved. The Due Process Clause of the Fourteenth Amendment has little meaning to a consumer such as Leonard, forced to trial stripped of his most valuable procedural safeguard—a jury to assess his credibility as against that of his landlord.

While not directly in point this Court has recently held the Seventh Amendment guarantees the right to a trial by jury in a statutory summary proceeding by the landlord brought in the District of Columbia to recover possession of real property. *Pernell* v. *Southall Realty, supra.* This Court's extensive opinion recognizes how fundamental the right to trial by jury is to a fair trial in such proceeding. Indeed, if this were an appeal from the District of Columbia there would be no doubt that such a waiver would be struck down in this case. *Overmeyer* v. *Frick Co., supra; Swarb* v. *Lennox, supra; Fuentis* v. *Shevin, supra;* and

*Pernell* v. *Southall Realty, supra,* all mandate the granting of certiorari in the instant case. The "you signed it—you're stuck with it" mentality has suffered a steady decline in judicial favor since the time of Charles Dickens. As eloquently stated by Mr. Justice Marshall in *Pernell* v. *Southall Relalty, supra:*

> "A landlord tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home. Id. at U.S. , 40 L.Ed. at 214.

## CONCLUSION

The New York State courts, by rejecting tenant's federal claim of right under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, have decided a federal question of substance not heretofore determined by this Court and have done so in a way probably not in accord with applicable decisions of this Court. Therefore, a writ of certiorari should issue to review the decision of the New York State Appellate Division, First Department.

Respectfully submitted,

HAWKINS, DELAFIELD & WOOD

By CLARENCE FRIED
*Attorneys for Petitioner*
67 Wall Street
New York, N.Y.

*Of Counsel:*
A. LAWRENCE WASHBURN, JR.
JOHN F. TRIGGS

# APPENDIX

## APPENDIX A

**Opinion of the Hon. Louis Grossman, Judge of the New York City Civil Court, entered May 21, 1973**

CIVIL COURT OF CITY OF NEW YORK
COUNTY OF NEW YORK

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Index. No. 7719/73
SPECIAL TERM, PART I
Motion Cal. No.
TRIAL TERM, PART 49

BERNARD I. STRAUSS, as Attorney and Agent for
SEVENTY SECOND ST. PROPERTIES, INC.,

*against*

CHARLES LEONARD

---

Present: Hon. LOUIS GROSSMAN Judge.

In this holdover proceeding, the tenant commenced occupancy of the subject apartment in 1962 for a three year term which was extended over the years with the final extension being for a term expiring September 30, 1972. The premises are subject to the Rent Stabilization Code.

The landlord offered the tenant a renewal lease pursuant to Section 60 of the Rent Stabilization Code. It appears that as at the time of said offer, the tenant was not in default in the payment of rent. The offer was made during May of 1972. The tenant claims that an acceptance was sent to the landlord during the first week of July, 1972

by ordinary mail. It also appears that the tenant was in default in the payment of rent as at the time he claims that he sent the acceptance to the landlord.

The offer to renew the lease, dated May 15, 1972 (Respondent's Exhibit A) requested the tenant's election as to the term of renewal and asked that it be returned via certified mail. It should be noted that there is no requirement in the Rent Stabilization Code as to the Method of mailing to be used for a tenant to respond to such an offer.

Section 50 of said Code does, however, provide that:

> "No tenant, so long as he continues to pay the rent, to which the owner is entitled shall be denied a renewal lease as prescribed by this Code."

Also, Section 54 of said Code provides:

> "The owner shall not be required to offer a renewal lease to a tenant, only upon the following grounds" . . .
>
> (C) The tenant has refused upon demand of the owner to execute . . . a renewal lease for a term of at least one year."

It should next be observed that the last lease between the parties (Petitioner's Exhibit "1") provides at paragraph 25 thereof that:

> "Any notice by Tenant to Landlord must be served by registered mail addressed to Landlord at the address where the last previous rental hereunder was paid."

The record also reveals that between November, 1970 and October, 1972 the landlord had instituted many non-payment summary proceedings against the tenant. This in and of itself is of no consequence, but when coupled with the fact

that the tenant was in default in the payment of rent as at the time that the acceptance was allegedly mailed, it would appear that prima facie proof was established as to a breach of a substantial portion of the lease.

In the absence of a direction in the Code, the more interesting issue is whether the tenant should be bound by the provision of the lease requiring notice by registered mail. In the first instance, the Court finds that there was inadequacy in the proof by the tenant as to the mailing of the acceptance by ordinary mail. The Court further finds that the tenant failed to adduce or prove receipt of such acceptance by the landlord.

Ad arguendo, if the Court did determine that the landlord did receive the letter of acceptance, the court would be constrained to hold that mailing by ordinary mail was not sufficient. It is very common for parties to agreement to provide for the method for notices to be given as to the matters arising under or as a result of said agreements. The provisions for notice are usually established so that there will not be any question as to the receipt of the communication.

The general rule of contracts that words will be given their ordinary meaning where nothing appears to show that they are used in a different sense, or where it appears that they were not used in their established legal or strictly technical meaning, applies equally to leases. If a lease provides that as a condition precedent to obtaining a renewal the tenant must perform certain acts, then the strict performance of such conditions precedent is absolutely necessary to the right of renewal.

In this proceeding there is no notice. The facts herein must be distinguished from those as in *Gordon* v. *Barash*, 67 Misc. 2d 764 which considered an acceptance actually received 5 days later than the prescribed time. Late notice was also given in *Sy Jack Realty Co.* v. *Pergament*

*Syosset,* 27 N.Y. 2d 449 wherein the tenant was relieved of its default. If a lease provides that as a condition to obtaining a renewal the tenant shall notify the landlord in writing on or before a certain date of his intention to exercise the right to renew, failure to give such notice on or before that date will forfeit the right to renew. Time is of the essence in such a covenant, and the giving of timely notice is a condition precedent upon the performance of which the tenant's right to a renewal is dependent.

As has been said, "The notice of election to renew must be unequivocal and unqualified and strictly according to the terms of the original lease. . . . However, where the lease provides for notice to mail is not disputed, then strict compliance will be held to be unessential." Such are not the facts in this proceeding. It has been held that where the agreement provides for a method of giving notice, the use of that method suffices, and receipt is not necessary; but if any other method is used, then the tenant must prove actual receipt of the notice. (Rasch, Landlord and Tenant, Section 236 and cases cited therein.)

When, as in this proceeding, the tenant is in default in the payment of rent as at the time when notice was to be given and fails to give the notice required, the Court has no alternative but to hold that the tenant has no defense to this proceeding.

Though forfeitures are to be avoided when there is a reasonable basis for doing so, the facts herein do not warrant the finding of a waiver of performance of conditions to renewal or the exercise of equitable relief from failure to perform conditions precedent to renewal.

Judgment shall be entered against Charles Leonard, the tenant herein, in the sum of $577.53 together with the appropriate interest and costs thereon. Possession of the

premises is awarded to the petitioner subject to a sixty (60) day stay of execution. The tenant shall pay as use and occupation until his removal from the premises the monthly rental as provided in the last agreement between the parties.

DATED: May 21, 1973

/s/ LOUIS GROSSMAN
Judge Civil Court

## APPENDIX B

**Decision and Final Judgment of Possession of Hon. Louis Grossman, Judge of the New York City Civil Court, entered May 22, 1973**

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

Index No. L & T 7719/73

BERNARD I. STRAUSS, as Attorney and Agent for SEVENTY SECOND ST. PROPERTIES INC.
*Petitioner*

*against*

CHARLES LEONARD.
*Respondent*

HOLDOVER—Decision and Final Judgment of Possession

The issues in this proceeding having come on for trial April 10, 1973; and the Court having rendered a decision in favor of the PETITIONERS;

FINAL JUDGMENT OF POSSESSION is rendered in favor of the PETITIONERS against the RESPONDENT and awarding to said PETITIONERS delivery of possession of the premises described in the petition, by reason of the expiration of the RESPONDENT'S term. Judgment as against tenant Mr. Leonard in the sum of $577.53 plus cost and interest.

Issuance of warrant stayed to and including 60 days. Use and occupancy to be paid at same rate as heretofore paid and as per opinion filed. Exhibits are with the Judge.

/s/ Louis Grossman
Louis Grossman
Judge Civil Court

Dated: May 22, 1973
Court Reporter: M. Killorin

Judgment entered in accordance with the above.

/s/ Howard F. Tyson
Howard F. Tyson
Chief Clerk

Dated: May 22, 1973

## APPENDIX C

**Decision and Order of New York Supreme Court, Appellate Term, First Department entered January 17, 1974, affirming Final Judgment of Possession in the court below**

APPELLATE TERM OF THE SUPREME COURT
FIRST DEPARTMENT,
DEC. 1973

No. 460

PRESENT: HON. PETER A. QUINN, J. P.,

VINCENT A. LUPIANO, SIDNEY A. FINE,
JUSTICES.

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BERNARD I. STRAUSS, as Attorney and Agent for
SEVENTY SECOND ST. PROPERTIES, INC.,
*Petitioner-Landlord-Respondent,*

*—against—*

CHARLES LEONARD,
*Respondent-Tenant-Appellant.*

---

Appeal by respondent from a final judgment of the Civil Court of the City of New York, entered May 22, 1973, in favor of petitioner.

PER CURIAM:

Scrutiny of the record warrants the conclusion that the tenant defaulted in exercising his option to renew his lease as required by the Rent Stabilization Code (Administrative Code of the City of New York § YY 51-6.0) and that such

default was not excusable. Further, tenant's contention that the waiver of trial by jury embodied in paragraph 23 of the lease should not be enforced is without merit. Indeed, the validity of this lease provision was challenged by the tenant in a prior appeal before this court and the enforceability of such provision was upheld (Strauss v. Leonard, May 1973 Term, No. 186).

Final judgment affirmed with $25 costs.

I Concur
P.A.Q.

I Concur
V.A.L.

I Concur
S.A.F.

Filed Jan. 17, 1974, New York Co. Clerk's Office

## APPENDIX D

**Order of New York Supreme Court, Appellate Term, First Department entered March 1, 1974, denying request for leave to appeal to the New York Supreme Court, Appellate Division, First Department**

At an Appellate Term of the Supreme Court, first department, held at the Court House, Borough of Manhattan, City of New York, on the 1st day of March, 1974.

Order upon motion 48135/73
Cal. No. 460/73.

Present: Hon. PETER A. QUINN, J.P., Hon. SIDNEY A. FINE, *Justices.*

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BERNARD I. STRAUSS, as Attorney and Agent for SEVENTY SECOND ST. PROPERTIES, INC.,

*Petitioner-Landlord-Respondent,*

*vs.*

CHARLES LEONARD,

*Respondent-Tenant-Appellant.*

---

The above named appellant having by notice of motion dated the 8th day of February, 1974, moved for an order granting leave to appeal to the Appellate Division, First Department from an order of this Court dated January 17, 1974, determining the appeal.

Now upon reading and filing said notice of motion and the affidavit of JOHN F. TRIGGS verified the 13th day of Feb-

ruary, 1974, in favor of said motion, and the affidavit of BERNARD I. STRAUSS, verified the 22nd day of February, 1974 and the papers annexed in opposition thereto.

IT IS ORDERED that said motion be and the same hereby is denied with $10 costs.

FILED MAR. 1—1974, NEW YORK CO. CLERK'S OFFICE.
Enter S.A.F.

Enter, S.A.F.
Justice, Appellate Term.

/s/ LOUIS GROSSMAN
Louis Grossman
Judge Civil Court

/s/ HOWARD F. TYSON
Howard F. Tyson
Chief Clerk

## APPENDIX E

**Order of New York Supreme Court, Appellate Division, First Department, entered May 9, 1974, denying request for leave to appeal to said Court**

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 9th day of May, 1974.

Present — Hon. Owen McGiven, Presiding Justice, Arthur Markewich, Emilio Nunez, Louis J. Capozzoli, Myles J. Lane, Justices.

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Bernard I. Strauss, as Attorney and Agent for
Seventy Second St. Properties, Inc.,
*Petitioner-Landlord-Respondent,*

*against*

Charles Leonard,
*Respondent-Tenant-Appellant,*

Order on application for leave to appeal
from Appellate Term

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An application having been made by the respondent-tenant-appellant to the Appellate Division of the First Judicial Department for leave to appeal to the Appellate Division from the order of the Appellate Term of the Supreme Court in this action entered in the office of the Clerk of the Supreme Court on January 17, 1974, and the said application having come on to be heard, on reading and filing the notice of application herein, dated April 8, 1974, and the affidavits of John F. Triggs and Anita Barrett in support

of said application, and the affidavit of Bernard I. Strauss in opposition thereto, and after hearing Mr. John F. Triggs for the application, and Mr Bernard I. Strauss opposed,

It is ordered that said application be and the same hereby is denied with $20 costs, with execution of judgment stayed for 30 days from the date of service upon petitioner-landlord-respondent by respondent-tenant-appellant of a copy of this order, with notice of entry.

ENTER:

HYMAN W. GAMSO
*Clerk.*

## APPENDIX F

**Interlocutory Decision and Order of Hon. Alexander Salottolo, Judge of the New York City Civil Court, entered March 16, 1973, granting the landlord's motion to strike the tenant's demand for trial by jury**

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

Index No. L & T 7719/73 Special Term, Part 49
Motion Cal. No.

BERNARD I. STRAUSS, as Attorney and Agent for
SEVENTY SECOND ST. PROPERTIES INC.

*against*

CHARLES LEONARD.

Present: HON. ALEXANDER SALOTTOLO, Judge.

Plaintiff's motion for an order striking out the respondent's jury demand and directing that this case be tried as a non-jury case is granted. Plaintiff is required to serve a copy of this order upon the calendar clerk, with proof of service, within 10 days after notice of entry of same, at which time the action shall be placed on the appropriate non-jury calendar for trial. The Court finds the tenant herein has effectively waived his right to a trial by jury and that he is not being deprived of any constitutional right by having done so.

The original lease executed by and between the parties on August 17, 1962, as extended, expressly contains a

waiver of trial by jury clause in paragraph "23" thereof. Further, said paragraph is highlighted by a marginal legend that reads in bold type as follows: "Waiver of Trial by Jury." The Court believes the defendants saw or should have observed this provision at the time he executed the lease.

It is the settled law of this state that in summary proceedings a provision in a lease waiving a trial by jury is valid and binding and will bar a trial by jury in litigation controlled by the provision provided the waiver is asserted. (Section 1344, Rasch, New York Landlord and Tenant Summary Proceedings, 2nd. Ed. pg. 162, citing cases). The case at bar fails squarely within the principle thus enunciated.

The Court is well aware that waiver of jury clause in leases executed subsequent to July 2, 1962 is null and void in cases involving personal injuries and property damage arising under breach of such leases. (Section 1344, Rasch, ibid). The facts herein clearly exclude this principle from consideration in this case.

The *Gardner* and *David* cases cited by defendant do not impress this Court and are also distinguishable on the facts.

A. S.

Dated: March 16, 1973

## APPENDIX G

**Order of New York Supreme Court, Appellate Term, First Department, entered on or about May 17, 1973, affirming without opinion the interlocutory decision and order in the court below granting the motion to strike the tenant's jury demand**

136, STRAUSS, pet- res, LEONARD, res-ap—Order unanimously affirmed, with $10 costs (Waterside Holding Corp. v. Lask, 233 App. Div. 456). No opinion.

*New York Law Journal, May 18, 1973, p. 18, col. 2*

## APPENDIX H

**Affidavit of Charles Leonard, Petitioner herein, sworn to March 6, 1973, in opposition to respondent's motion to strike petitioner's demand for a jury trial**

### EXHIBIT H

### AFFIDAVIT IN OPPOSITION TO MOTION FOR AN ORDER STRIKING RESPONDENT'S JURY DEMAND

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

BERNARD I. STRAUSS, as Attorney and Agent for
SEVENTY SECOND ST. PROPERTIES, INC.

*Petitioner*
(Landlord)

*against*

CHARLES LEONARD

*Respondent*
(Tenant)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CHARLES I. LEONARD, being duly sworn, deposes and says:

I am the Respondent (Tenant) in the above-entitled caption and am fully familiar with all the facts and circumstances surrounding this summary proceeding.

I make this affidavit in opposition to the motion by the Petitioner to strike my demand for a jury trial.

Petitioner's motion is based on the presumption that I waived my constitutional right to a jury trial in this proceeding because a form of waiver of jury trial appeared in the fine print of the lease which I executed in 1962.

Such waiver was never in fact made by me, because at the time of the execution of my lease the waiver of my fundamental constitutional right to a jury trial was not called to my attention.

My attorney advises me that the waiver of my fundamental constitutional right to a jury trial in this proceeding cannot be presumed from the fact that a waiver appeared in the fine print of my lease.

My attorney further advises me that in order to strike my jury demand the Petitioner must show that the waiver of my fundamental constitutional right to a jury trial was consciously and knowingly made by me.

I have advised my attorney that at the time of the execution of the lease I was not represented by counsel and that the broker from Douglas Elliman, Inc., the authorized agent of the Landlord, told me in answer to my questions about the lease that this was a standard form of lease used throughout the City of New York and that I should go ahead and sign it.

I took the word of the broker that I was signing a standard form of lease for residential apartments. I did not feel it necessary to read through all of the fine print in the lease or to obtain an attorney for the apparently simple transaction of renting an apartment in the City of New York. Certainly it was the farthest thing from my mind that the serious consequences of a waiver of my fundamental constitutional right to a jury trial would result from the execution of the lease.

My attorney advises me that my right to a jury trial is crucial in this case because the sole issue in the trial of this proceeding will turn on the issue of my own credibility. The question of my right to stay in my apartment turns on whether I did, in fact, mail to the Landlord within the pre-

scribed time my acceptance of his offer to renew my lease. I have no return receipt; the envelope which I sent to my Landlord was not returned to me, and the Landlord's attorney has denied that the Landlord received my acceptance.

My attorney has further advised me that the Constitution of the State of New York affords me the right to have the issue of my own credibility determined by my peers; that is, by jurors who possess complete impartiality, in the sense that they are the determiners of fact for this case only and that they are insulated from, and are therefore uninfluenced by, either the parties, their attorneys, or the facts and circumstances of similar cases.

I have lived in my apartment since September of 1962 and I feel that my apartment is my home, just as fully as if I owned my own house and the land on which it was situated. In this case my right to remain in my home hangs in the balance. My only defense is that I complied with Section 60 of the Rent Stabilization Code by sending my acceptance to my Landlord by regular mail. It is of the utmost importance to me that my credibility be weighed against the credibility of the Landlord by a jury consisting of my peers.

s/CHARLES I. LEONARD
s/Charles I. Leonard

Sworn to before me this 6th day of
March, 1973.

s/ A. Lawrence Washburn, Jr.
*Notary Public*

A. LAWRENCE WASHBURN, JR.
Notary Public, State of New York
No. 31-9541980
Qualified in New York County
Commission Expires March 30, 1974

## APPENDIX I

**Affirmation by A. Lawrence Washburn, Jr., attorney for petitioner herein, dated March 6, 1973 in opposition to motion to strike petitioner's demand for a jury trial**

Index No. 7719 1973

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

BERNARD I. STRAUSS, as Attorney and Agent for
SEVENTY SECOND ST. PROPERTIES, INC.
*Petitioner (Landlord)*

*—against—*

CHARLES LEONARD
*Respondent (Tenant)*

AFFIRMATION BY ATTORNEY IN OPOSITION TO MOTION FOR AN ORDER STRIKING RESPONDENT'S JURY DEMAND

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

A. LAWRENCE WASHBURN, JR., being an attorney at law duly admitted to practice in the State of New York and being associated with Sullivan, Donovan, Hanrahan, McGovern & Lane, attorneys of record for the Respondent herein, does hereby affirm the truth of the following statements under penalties of perjury:

I have read the Notice of Motion herein and the affidavit in support therof by Bernard I. Strauss, Esq. and am fully

familiar with all matters relating to the present motion and the present Summary Proceeding of which this motion is a part.

On the return date of the instant Summary Proceeding (Hold Over), Friday, February 16, 1973, I appeared at the calendar call and served Bernard I. Strauss with a Verified Answer to the Petition, which included a demand for a jury trial. On that day I filed the Answer, together with a jury fee of $25, at the office of the Clerk.

When I served Bernard I. Strauss, Esq. with a copy of the Verified Answer and Jury Demand herein, he complained somewhat bitterly that his client would be put to the additional expense of bringing on a motion to strike the jury demand and stated to me that the original lease herein, executed in 1962, contained a waiver of jury trial.

I advised Bernard I. Strauss, Esq. that due to the summary nature of this proceeding and the fact that I had received notice from my client at 8:30 P.M. on the 14th day of February, 1973 (one business day prior to my appearance at the calendar call), I had not seen a copy of the lease or had an opportunity to review the validity of any possible waiver of a jury trial.

I further advised Bernard I. Strauss, Esq. that I did not wish to put his client to any unnecessary expense in moving to strike the jury demand and asked him to produce a copy of the lease executed in 1962. Mr. Strauss promised to produce the lease forthwith or, at the latest, on Tuesday following Washington's Birthday, February 20, 1973.

Mr. Strauss did not produce the lease executed in 1962 or a copy thereof on Tuesday, February 20, 1973, or thereafter until he called my office at 4:00 P.M. on Thursday, February 22, 1973. By this time, I had had my client go through his papers and produce the lease, and I advised Mr. Bernard I. Strauss when he telephoned my office that

my own client had produced an original copy of the lease executed in 1962 by both the Landlord and the Tenant. I further advised Mr. Strauss that it would therefore be unnecessary for him to have a copy of the lease delivered to my office. At no time during our telephone conversation on February 22, 1973 did I agree that the waiver contained in the lease was valid or that it was applicable to the cause of action alleged in this summary proceeding. I simply told Mr. Strauss that I had examined the lease and found the waiver. Apparently Mr. Strauss had assumed from this statement that I would be ready to withdraw my jury demand, but I at no time made any commitment to Mr. Strauss in this respect.

On the evening of February 22, 1973, within hours of my telephone call with Mr. Strauss, I interviewed my client on the facts and circumstances surrounding the execution of the lease dated August 17, 1962. He advised me of the facts set forth in his affidavit in opposition to this motion. In essence, my client signed said lease in reliance on the statement of a reputable real estate broker (Douglas L. Elliman & Co.) acting as the authorized agent of the Landlord, that said lease was a standard form in general use throughout the City of New York. This representation carried the clear implication that there was nothing of an unusual nature in the lease which should be called to the attention of my client, who was unrepresented by counsel at the time of the transaction. According to my client, there was at no time any reference made either to a jury trial or to the waiver of that or any other fundamental constitutional right belonging to my client.

Based on my interview with my client and my general knowledge of recent developments in the area of waiver of constitutional rights I went on the following morning, February 23, 1973, to the Law Library of the Bar Association

of the City of New York and reviewed the applicable law. At 10:00 o'clock that morning, I called the office of Bernard I. Strauss, Esq., left a message with his secretary that my client had not made a conscious and knowing waiver of his right to jury trial, and asked her to advise Mr. Strauss that I was reviewing the law of waiver with respect to the lease. I had Mr. Strauss' secretary read the message back to me and she assured me that he would receive it by 1:00 P.M. that day. Upon completion of my review of the law of waiver of constitutional rights as it applies to contractual waivers in civil cases, I again called Mr. Strauss' office and left a message that I was unwilling to withdraw my client's demand for a jury trial. At 4:00 o'clock in the afternoon of February 23, 1973, I spoke on the telephone with Mr. Strauss personally. He was very upset that I would not withdraw my jury demand and stated that under no circumstances would he go to trial if there were a jury. Mr. Strauss advised me that he would move orally on the adjourned date of this summary proceeding, February 26, 1973, to strike the jury demand. I in turn advised Mr. Strauss that I would be prepared with a memorandum of law stating the reasons for my position.

On the return date, Mr. Strauss made his oral motion to strike the jury demand before Hon. Richard W. Wallach of this Court. Judge Wallach at first agreed to strike the jury demand on the oral motion of Mr. Strauss. However, I advised Judge Wallach that my research indicated that the United States Supreme Court last term had applied the standards of waiver of constitutional rights in criminal cases to civil cases in the landmark rulings of *D. H. Overmyer Company, Inc. of Ohio* v. *Frick Company*, 405 U.S. 174, 92 S. Ct. 775 (1972), and *Swarb* v. *Lennox*, 314 F. Supp. 1091, *aff'd* 405 U.S. 191, 92 S. Ct. 767 (1972).

Judge Wallach advised Mr. Strauss that he could not rule from the bench on a matter which involved a recent United States Supreme Court Decision. He requested that Mr. Strauss bring his motion to strike the jury demand on notice and upon papers. Mr. Strauss agreed to do so and requested an adjournment of the summary proceeding to March 7, 1973.

On Tuesday, February 27, 1973, I was served with the instant Notice of Motion by Mr. Strauss. Said motion was made returnable on the 7th day of March, 1973, the same day as the adjourned date of this summary proceeding.

Submitted herewith is the Memorandum of Law served upon Mr. Strauss at the call of the calendar last February 26, 1973. The Court's attention is called to the cases cited in the Memorandum, in addition to the following cases which have interpreted the *Overmyer* and *Swarb* rulings on the waiver of fundamental constitutional rights by contract prior to the commencement of civil proceedings:

*Fluentes* v. *Shevin*, 407 U.S. 67, 94-96, 92 S. Ct. 1983 (1972) (*dicta* explaining *Overmyer*):

> "The facts of the present cases were a far cry from those of *Overmyer*. There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. *The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.* The Court in *Overmyer* observed that 'where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue.' *Id.*, at 188." [Emphasis supplied]

*Cedar Rapids Engineering Co.* v. *Haenelt,* 68 Misc. 2d 206, 326 N.Y.S. 2d 653 (Supreme Court, Sullivan Co., 1971), *affirmed,* 39 A.D. 2d 275, 333 N.Y.S. 2d 953 (3rd Dep't, 1972) (App. Div. referring to *Overmyer* vis-a-vis lack of conscious and knowing waiver of fundamental right to due process in replevin action under review) wherein the lower court stated:

> "The underlying security agreements seem to be contracts of adhesion wherein the terms were specified by the plaintiff. Accordingly, it would be difficult to conjure an intentional, intelligent waiver from those documents." (footnote #4, 68 Misc. 2d at 210, 326 N.Y.S. 2d at 658.)

It is Respondent's position that an order by this Court striking Respondent's jury demand would be a denial of due process of law under the Fourteenth Amendment to the United States Constitution because it is based on a *presumed* waiver of Respondent's fundamental right to a jury trial, when in fact no knowing and conscious waiver in fact occurred.

It is Respondent's position that to presume a waiver of the fundamental right to jury trial under the circumstances of this case would constitute a denial of due process of law under the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner's motion to strike Respondent's demand for a jury trial should be denied in all respects.

Dated: New York, N. Y.
March 6, 1973

s/ A. LAWRENCE WASHBURN, JR.
A. Lawrence Washburn, Jr.

## APPENDIX J

**Affirmation by A. Lawrence Washburn, Jr., attorney for petitioner herein, dated May 17, 1974, stating intention to appeal to the Supreme Court of the United States.**

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

Index No. L&T 7719/73

BERNARD I. STRAUSS, as Agent for
SEVENTY SECOND STREET PROPERTIES, INC.,
*Petitioner-Landlord*

—against—

CHARLES LEONARD,
*Respondent-Tenant.*

AFFIRMATION OF INTENTION TO APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

A. LAWRENCE WASHBURN, JR., being an attorney at law duly admitted to practice in the courts of the State of New York and being associated with Hawkins, Delafield & Wood, attorneys of record for the Respondent herein, hereby affirms under penalties of perjury and states as follows:

1. I have been an associate attorney in the law firms representing the Respondent in this proceeding since its commencement in February, 1973, having been actively involved with the case since that time. I am fully familiar with all of the prior proceedings and pleadings heretofore had herein.

2. I submit this affirmation in compliance with CPLR 5519(a)(6). This affirmation is an indication of the Respondent's intention to petition the Supreme Court of the United States for a Writ of Certiorari to review the order of the Supreme Court of the State of New York, Appellate Term, First Department, dated and entered the 17th day of January, 1974 affirming a final judgment of the Civil Court of the City of New York, County of New York, entered the 22nd day of May, 1973, Respondent's motions for permission to appeal to the Appellate Division, First Department, having been timely made and denied by the Appellate Term, First Department, by order dated and entered March 1, 1974 and by the Appellate Division, First Department, by order dated and entered May 10, 1974. I intend to file my Petition for Writ of Certiorari to the Supreme Court of the United States within the time prescribed by law and without asking for an extension of time.

3. The Petition for Writ of Certiorari will be based upon 28 United States Code §1257(3) which provides for judicial review by the Supreme Court of the United States of final judgments rendered by the highest Court of a State in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

4. The Petition for Writ of Certiorari will seek review, pursuant to Rule 19 of the Rules of the Supreme Court of the United States, of the decision herein of the Honorable Alexander Salottolo, Judge of the Civil Court

of the City of New York, dated and entered March 16, 1973, such decision being a part of the final judgment unanimously affirmed in a decision by Justices Quinn, Lupiano and Fine of the Appellate Term, First Department in a decision dated January 17, 1974, which decided a federal question of substance not theretofore determined by the Supreme Court of the United States in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

5. The Petition for Writ of Certiorari will seek review of the following question:

> Whether an order by a State court in an eviction proceeding striking the tenant's jury demand constitutes a denial of due process of law under the Fourteenth Amendment of the United States Constitution where such order is based on a *presumed* waiver of the tenant's State constitutional right to a jury trial in the absence of *any* showing by the landlord that a knowing, conscious and voluntary waiver in fact occurred at the time of the execution of standard long form lease containing a contractual waiver of the tenant's right to trial by jury.

6. Said substantial federal question was timely raised in the Civil Court of the City of New York in my Affirmation in Opposition to Motion for an Order Striking Respondent's Jury Demand sworn to March 6, 1973, at page 6 thereof and contained in the record of proceedings herein as follows:

> "It is Respondent's position that an order by this Court striking Respondent's jury demand would be a denial of due process of law under the Fourteenth Amendment to the United States Constitution because it is based on a *presumed* waiver of Respon-

> dent's fundamental right to a jury trial, when in fact no knowing and conscious waiver in fact occurred."

7. Said substantial federal question was decided by Hon. Alexander Salottolo, Judge of the Civil Court of the City of New York, in his decision dated and entered March 16, 1973 as follows:

> "The Court finds the tenant herein has effectively waived his right to a trial by jury and that he is not being deprived of any constitutional right by having done so."

8. Said substantial federal question was duly raised by the attorneys for Respondent in the argument contained in their brief before the Appellate Term, First Department on page 21 therof in the following language:

> "In light of the above mentioned cases there is little doubt left as to the necessity for a knowing, intelligent and voluntary waiver of a constitutional right under the relevant Supreme Court decisions."

9. Said substantial federal question was decided by the Appellate Term, First Department, in its decision dated January 17, 1974 as follows:

> "Further, tenant's contention that the waiver of trial by jury embodied in paragraph 23 of the lease should not be enforced is without merit. Indeed, the validity of this lease provision was challenged by the tenant in a prior appeal before this Court* and the enforceability of such provision was upheld, (Strauss v. Leonard, May, 1973 term, #186).

10. Said decisions of the Civil Court of the City of New York and the Appellate Term, First Department, having ruled upon and rejected the Respondent's contention that

*The appeal referred to by the Court was an interlocutory appeal from Judge Salottolo's decision prior to the trial in this case.

federal due process of law applies to the waiver of a state constitutional right in a civil proceeding, have decided a federal question of substance not heretofore determined by the Supreme Court of the United States.

11. Said State court decisions have been decided in a way probably not in accord with *Overmyer Co.* v. *Frick,* 405 U.S. 164 (1972); *Swarb* v. *Lennox,* 405 U.S. 191 (1972); *Fluentes* v. *Shevin,* 407 U.S. 67 (1972) in that a waiver of a fundamental right has been presumed in the absence of *any* showing that said waiver contained in a long form standard lease was in fact knowing, conscious or voluntary.

12. I submit this affidavit in compliance with CPLR 5519(a)(6) in order that the enforcement of the orders and judgment might be stayed pending the outcome of the petition to the Supreme Court of the United States for a Writ of Certiorari to review the order affirming the final judgment herein. I intend to file said petition in the Supreme Court of the United States within 90 days of the order of the Appellate Division, First Department, dated May 10, 1974, denying Respondent's motion for leave to appeal.

13. Since I have now served you with this affirmation stating my intention to appeal, within 5 days of your service of the order of the Appellate Division, First Department, dated May 10, 1973, with notice of entry thereof, you are obliged, pursuant to CPLR §5519(e), to forego any enforcement proceedings in the above-captioned matter.

A. Lawrence Washburn, Jr.
A. Lawrence Washburn, Jr.

Dated: New York, N.Y.
May 17, 1974

To: Bernard I. Strauss, Esq.
Attorney at Law
261 Broadway
New York, New York

# RESPONDENT'S BRIEF

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SEP 13 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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No. 74-86

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CHARLES LEONARD,

Petitioner

v.

BERNARD I. STRAUSS.
As Agent For
SEVENTY-SECOND STREET PROPERTIES, INC.

Respondent.

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# RESPONDENT'S BRIEF

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NATHAN COOPER
Attorney for Respondent
261 Broadway
New York, New York 10007

Of Counsel:
BERNARD I. STRAUSS

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IN THE

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# RESPONDENT'S OPPOSING BRIEF

## STATEMENT OF CASE

The petitioner seeks a Writ of Certiorari. The underlying law suit is a summary proceeding by the landlord against the tenant in the nature of a summary hold over proceeding alleging that the tenant had remained in possession after the end of his term and demanding a judgment of eviction awarding possession to the landlord.

During the course of the proceeding, the Court granted the landlord's motion to strike tenant's Jury Demand which interlocutory order was affirmed by the Appellate Term. After trial, there was a decision and final judgment in favor of the landlord which was affirmed by the Appellate Term and the Appellate Term denied leave to appeal to the Appellate Division and the Appellate Division denied leave to appeal to

that Court which terminated all State appeals available to the tenant. The tenant now seeks a review claiming that he has been denied his rights under the Fourteenth Amendment of the United States Constitution.

The lease which is the subject matter of the action, provided among its terms, stressed by a marginal legend in bold type labelled "Waiver of Trial by Jury", the following language:

> "It is mutually agreed by and between Landlord and Tenant that the respective parties hereto shall and they hereby do waive trial by jury in any action, proceeding or counterclaim brought by either of the parties hereto against the other on any matters whatsoever arising out of or in any way connected with this lease, the Tenant's use or occupancy of said premises, and/or any claim of injury or damage."

The lease was for a three-year term commencing in 1962 extended by repeated written renewals, the final one prescribing a term expiring September 30,1972. The theme of the tenant's defense throughout the summary proceeding was that he should be granted a new lease for a term of one year commencing October 1,1972 and it is a fact that his maneuverings have delayed his eviction from the premises for almost a year past that date which to some extent makes this matter moot.

Article 1, Section 2 of the New York Constitution provides:

> "A jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

## POINT

## THE WAIVER OF JURY IS AS CONSTITUTIONAL AS THE RIGHT TO A JURY TRIAL AND MAY BE RELIED ON

The petitioner begs the question when he speaks of constitutional rights and cites inapposite cases in support. The respondent-landlord has its rights to rely on an express waiver of jury provision in a lease openly and freely executed by the tenant. The tenant's claim that he was not represented by attorney when he signed the lease and that a broker (unidentified and not established as the landlord's agent) told him it was a standard form of lease used throughout the City of New York and that he should go ahead and sign it, does not in any way affect

the validity of the waiver. The same is true of the claim that "the waiver was never called to the attention of the Tenant". It seems almost superfluous to comment on the strange and unlikely recollection of the tenant as to the circumstances under which he signed a standard form of lease more than eleven years ago.

In the case of Matter of Stone, 272 N.Y. 121, 5 N.E. 2nd, 61, the Court of Appeals stated "Ordinarily, the signer of a deed or other instrument, expressive of a final act, is conclusively bound thereby. That his mind never gave assent to the terms expressed is not material (Wigmore on Evidence Sec. 2415). If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be

read was equally negligent. In either case the writing binds him. Pimpinello v. Swift & Co., 253 N.Y. 159, 162, 163, 170 N.E. 539,531."

The petitioner failed completely to show any error in the statement by the Court below. "It is settled law of this State that in summary proceedings a provision in a lease waiving a trial by jury is valid and binding and will bar a trial by jury in litigation controlled by the provision provided the waiver is asserted. Section 1344, Rasch, New York Landlord and Tenant Summary Proceedings, 2nd Ed. pg. 162 citing cases)."

## CONCLUSION

The New York State Courts did not refuse to recognize the tenant's Federal claim of right

under the due process clause of the Fourteenth Amendment of the United States Constitution but ruled properly that the right to a Jury trial was effectively waived. Therefore, the application for a Writ of Certiorari should be denied.

Respectfully submitted,

NATHAN COOPER
Attorney for Respondent
261 Broadway
New York, New York

Of Counsel:
BERNARD I. STRAUSS